MISSOURI DEPARTMENT OF NATURAL RESOURCES
LAND RECLAMATION COMMISSION

In the Matter of:	)	
	)	
MAGRUDER LIMESTONE CO., INC.	)	Proceeding Under
Osage Beach Quarry, Miller County, Mo.,	)	The Land Reclamation Act,
Applicant,	)	Sections 444.760 – 444.789, RSMo.
	)	
LAKE OZARK – OSAGE BEACH	)	
JOINT SEWER BOARD, et al	)	
Petitioners,	)	
	)	
v.	)	
	)	
LARRY P. COEN,	)	
Staff Director,	)	
Land Reclamation Program,	)	
Division of Environmental Quality,	)	
Respondent,	)	

ORDER DENYING MOTION TO DISMISS

GROUNDS FOR MOTION

Petitioner – Lake Ozark – Osage Beach Joint Sewer Board (*Petitioner*) filed its Motion to Dismiss on March 4, 2008. Applicant filed its Response on March 20, 2008, with verifying Affidavit of Dean McDonald, agent of Applicant. Petitioner presented three grounds as a basis for granting the Motion to Dismiss. The grounds asserted for dismissal were:

1. Application failed to include a map identifying utilities on the land to be mined;
2. Application failed to include a post-mining land use for the land to be mined; and
3. Application failed to include all parties with any interest in the land to be mined.

Petitioner's Motion to Dismiss fails on each asserted ground, as hereinafter addressed.

DISCUSSION AND RULING ON GROUNDS FOR DISMISSAL

Petitioner's Arguments

Map Identifying Utilities

Petitioner argues that the Application was incomplete because it failed to include a map indentifying utility easements with the Application. The argument is based upon 10 CSR 40-10.020(2)(E)(2)(A). The regulation provides in relevant part with regard to the application to be filed in this instance:

> (E) Two (2) different maps sufficient for the following purposes:
> …
> 2. One (1) map of sufficient scale and detail to illustrate the following:
> A. The names of any persons or businesses having any surface or subsurface interest in the lands to be mined, … ."

Petitioner claims that both Petitioner and Ameren UE (Ameren) have easements for utility lines that run through the proposed quarry site. Therefore both easements should have been identified on a map filed with the Application.

Post-Mining Plan

Petitioner asserts the Application was incomplete because it "failed to include any indicia of post-reclamation land use."

Interest in Land to be Mined

Petitioner argues the Application was incomplete "when it did not include the utility easements and identified Eolia Development as the land owner in its Application." Petitioner's argument is based upon section 444.772.2(1) RSMo, which reads in relevant part as follows: "*Application for permit shall be made on a form prescribed by the*

commission and shall include: (1) The name of all persons with any interest in the land to be mined … ."

It is the contention of Petitioner that the language "any interest" includes the sewer easement held by the Sewer Board and the easement held by Ameren. Petitioner further claims under this ground for dismissal the identification of Eolia Development as the landowner of the proposed quarry site warrants dismissal, since Eolia did not own the land on the date of the Application.

Rulings

Underlying Arguments

Counsel for Petitioner advanced two lines of argument in his **Suggestions** which underlie each of the three specific claims upon which dismissal is sought. The two arguments are (1) Missouri law does not allow time to cure an incomplete application; and (2) the Commission is required to recommend denial of an incomplete application. Both arguments are without merit.

Missouri statutes are silent as to whether the Land Reclamation Program (LRP) has the ability to request that an applicant supplement the original application with additional information. It is clear there is no prohibition on the LRP requiring an application to provide additional documents and information. The interpretation of the controlling statutes and regulations and the common permit-review practice of the staff of the LRP with regard to permit applications clearly is to allow an application to be amended and supplemented, as occurred in this instance. **Response**, *citing to Coen Deposition & Zeaman Deposition*.

As to the assertion that section 444.773 RSMo requires the Commission to deny an incomplete application, it is likewise without merit. Subsection 1 states: "*If the director determines that the application has not fully complied with the provisions of section 444.772 or any rule or regulation promulgated pursuant to that section, the director shall recommend denial of the permit.*" In this instance, it is obvious the Director determined the Application complied with applicable statutes and rules.

Counsel for Petitioner did not cite to any specific language to support his claim that the Commission and hence the Hearing Officer "is required to recommend denial of an incomplete application." The reason for the lack of any such citation is that nowhere in the statute can be found the alleged mandate for the Commission. In the absence of a specific prohibition against the amending or supplementing of an application, the claims Petitioner puts forth are without sufficient basis to warrant the dismissal of this action.

Had it been the desire of the legislature to only allow an applicant one chance to submit an application and if there were any errors or omissions, the application would be rejected, without opportunity to correct any defects, the language of Chapter 444 would so reflect. That is not the case. To take such a course of action would require the putting of a form over substance that is not statutorily required.

Administrative agencies are free to implement policies and procedures that are necessary to carry out their purposes, and "an agency's interpretation generally is to be given great weight." *Burlington Northern R.R. v. Director of Revenue, 785 S.W.2d 272, 273 (Mo. 1990)*. The LRP has interpreted Chapter 444 and the supporting regulations as allowing applicants to supplement their applications on an "as-needed" basis. **Response**,

citing to Coen Deposition & Zeaman Deposition. It is only logical that this would be the case.

The Hearing Officer finds no basis upon which he may or should override the LRP's application of the statutes and regulations. The arguments asserted by Petitioner which provide the underpinning for the three specific claims asserted are without merit.

Map Identifying Utilities

Petitioner's argument relative to the failure to submit a map identifying the utility easements of the Board and Ameren is not well taken.

It is to be first noted that Applicant's personnel followed the instructions provided by the staff of the LRP on this point. **Response**, pp. 2-3. The submission of the permit expansion application on April 18, 2007 was in compliance with applicable statutes and regulations as interpreted and implemented by the LRP. As the LRP did not require companies to list utility easements on maps submitted with applications, Applicant satisfied the obligations imposed by 10 CSR 40-10 for application completeness as administered by the LRP.

Petitioner's argument that somehow the omission of submitting maps with the original application was a failure to comply with the public notice requirements to the prejudice of Ameren or the Board is fatally flawed. The purpose of an application is not to provide notice to anyone outside of the LRP. Once the LRP has reviewed an application and deemed it complete, the applicant is then instructed to begin the public notice process. The inclusion of a map with utility easements or the failure to include such a map in no way effects the notice provided to the public. The Motion provided no

evidence to establish a failure of Applicant to comply with the statutory notice requirements.

Petitioner's claim is void of any basis upon which it can be determined that due process rights in this appeal have been denied to the Board. To the contrary, the Board has been able to exercise its right to a formal public hearing (*evidentiary hearing*). The Board has in no manner been denied opportunity to present substantial and persuasive scientific evidence to support the claims it seeks to present in this matter.

Petitioner's attempt to serve as a surrogate for Ameren in this proceeding on this and the other points is without any legal basis. Petitioner provides no statutory or case law citations upon which the Hearing Officer could find that the Board has standing in this proceeding to argue on behalf of Ameren. Petitioner's claim as to Ameren not receiving notice is based at best upon nothing but speculation resting upon conjecture. It provides no basis for dismissal of the Application and this proceeding.

Post-Mining Plan

The reasoning and conclusions reached above are likewise applicable to the ruling on this point. There is nothing in Petitioner's Motion under this point providing a basis for the dismissal of the application. No due process rights of Petitioner were impaired in any form by the omission of Applicant to provide a post-mining plan in its original permit expansion application. Allowing Applicant to amend its Application in no way impairs any of Petitioner's rights in this process. Petitioner's Motion fails to demonstrate in any fashion how such an omission would prevent the Petitioner from attempting to provide competent and scientific evidence that the safety of the Board's easement would be unduly impaired by the issuance of the permit expansion sought by Applicant.

Interest in Land to be Mined

Petitioner finally argues that the failure of Magruder to list the Board and Ameren as entities having interests in the land to be mined warrants dismissal of the application and this proceeding. The argument is not well taken. Applicant followed the instructions from the LRP. The position of the LRP at the time of Magruder preparing and submitting its Application was that only an ownership interest in the surface or the minerals beneath the surface was what was required. Neither the Board nor Ameren has been shown to have any such interest. Applicant properly followed the statutory requirements as interpreted by the LRP and listed the property owners of the land to be mined.

Akin to the other claims advance by Petitioner, there is no showing that Petitioner has been harmed in its ability to pursue its claim of undue impairment to the safety of its easement – sewer lines, or any other claim it might properly raise. Even assuming, without finding, that the Application was required to list the Board as an entity with an "interest in the land to be mined," the failure of the Applicant to do so did not prevent the Petitioner from gaining status as a party to this proceeding. Quite simply, Petitioner's argument has been rendered moot by the Board's existence as a party in this matter.

As to the claim Petitioner seeks to advance on behalf of Ameren, there is an even greater defect in this argument. How was Petitioner's claim in this matter affect in any manner by the omission in the Application to an alleged easement held by Ameren? It wasn't. Petitioner has been able to exercise its due process rights in the proceeding irrespective of whether Ameren was identified as having an easement in the Application. Petitioner's Motion failed to present any evidence to establish the Ameren easement,

what type of easement it is and where it actually is located. In short, the record to this point contains no evidence of the existence of an Ameren easement.

More importantly, even assuming for the sake of argument, that the LRP's interpretation of the law was in error, there is no basis upon which the Hearing Officer can conclude that either the Board or Ameren has any interest in the "land to be mined." The phrase "land to be mined" is not defined in the Land Reclamation Act. *§§444.760 – 444.790 RSMo*. However, the term "mining" is defined for purposes of the statute as: "*the removal of overburden and extraction of underlying minerals or the extraction of minerals from exposed natural deposits for a commercial purpose*, … ." Petitioner provided no evidence in support of its motion that the Board's easement, which the Hearing Officer understands from hearsay statements consists of a sewer line easement, is any part of the land from which Magruder proposes to remove overburden and extract underlying minerals.

The very nature of such an easement, being located not over the surface of land, but within the earth, establishes that Magruder cannot remove overburden and extract minerals from such an easement, as it would interfere with the easement right of the Board to maintain the sewer line within the easement. The Hearing Officer is assuming that the recorder easement does in fact establish the Board's right to install and maintain the sewer lines within the easement. The Hearing Officer understands that the Application relates to a 200+ acre tract of land. However, the Hearing Officer also understands that not all of the acreage will actually be mined.

Likewise, there is no evidentiary basis, upon which the Hearing Officer can conclude the Ameren easement, which the Hearing Officer assumes would be a power

line easement, exists on land from which Magruder proposes to remove overburden and extract underlying minerals. Petitioner's Motion has failed to establish in point of fact that either the Board or Ameren were in fact entities with an "interest in the land to be mined."

Petitioner's argument regarding the listing of Eolia Development as the owner, when at the time of filing the Application Eolia did not in fact own the land is unpersuasive. It was submitted with the Application that Eolia would be closing on the land on May 1, 2007, only 12 days after the date of the Application. Common sense would certainly support providing the information as was done by Applicant. Furthermore, at no time was it shown that LRP deemed this to be a violation or omission in the application process. Petitioner again provides no demonstration as to how listing the entity that would be the owner at the time of the quarrying operation, instead of the then record owner damaged Petitioner's rights in this proceeding. It did not.

One final minor point needs to be addressed. Petitioner takes issue with the public notice referring to the proposed quarry as a "permit expansion." Apparently, Counsel for Petitioner was unaware that the proper term to be employed by the LRP with reference to the opening of a new quarry site under an existing permit is "permit expansion." Petitioner's objection on this point is unfounded and irrelevant.

Conclusion

The Motion to Dismiss raised three points none of which were irrelevant to Petitioner's due process rights in this proceeding. The arguments made provided no statutory basis upon which the Hearing Officer can conclude that a dismissal of the Application is required or even warranted. To dismiss the Application on the basis of the

spurious arguments presented would be to deny Applicant its due process rights to have the issue of the permit expansion decided on the merits of the case.

ORDER

Motion to Dismiss is denied.

Certification of Service

The Hearing Officer certifies that he has sent a copy of this Decision and Order to the Attorneys of record for Applicant, Joint Sewer Board - Petitioner, McGovern Petitioners and Respondent by email attachment on March 21, 2008.

SO ORDERED March 21, 2008.

MISSOURI DEPARTMENT OF NATURAL RESOURCES

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